(2)

No. 90-119

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CITIZENS FOR FAIR UTILITY REGULATION,

Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT TEXAS UTILITIES ELECTRIC COMPANY IN OPPOSITION

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August 13, 1990

QUESTION PRESENTED

Whether the United States Nuclear Regulatory Commission's (NRC or Commission) discretionary decision to deny Citizens for Fair Utility Regulation's (CFUR) petition to intervene and request for a hearing on the application of Texas Utilities Electric Company (TU Electric)[1] for an operating license for the Comanche Peak Steam Electric Station (Comanche Peak), that was filed nine years out-of-time, six years after CFUR voluntarily withdrew from those hearings, and one month after those hearings were dismissed, is a violation of the Commission's regulations, 10 C.F.R. § 2.714(a)(1) (1990).

[1] Texas Utilities Company is the parent company of Texas Utilities Electric Company.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT TEXAS UTILITIES ELECTRIC COMPANY IN OPPOSITION

Respondent, Texas Utilities Electric Company, respectfully requests that this Court deny the Petition for Writ of Certiorari to review the April 12, 1990 decision of the United States Court of Appeals for the Fifth Circuit. The Petition fails to articulate any special or important reasons for issuing a writ of certiorari. The Fifth Circuit's decision involves a routine procedural issue decided under well-established case law which raises no new or novel issue, involves no constitutional question, and creates no conflict with any decision of this Court or any other court.[2]

[2] The underlying decision of the Commission, *Texas Utilities Electric Co., et al.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605 (1988) (hereinafter CLI-88-12), was set forth in Appendix B to the Petition for Writ of Certiorari. The Commission modified CLI-88-12 by an April 20, 1989 decision, *Texas Utilities Electric Co., et al.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-89-6, 29 NRC 348 (1989), which is reprinted in Appendix A to this Brief in Opposition.

STATEMENT OF THE CASE

For the statement of the case, Respondent TU Electric adopts the description of the facts and procedural history in the opinion of the United States Court of Appeals for the Fifth Circuit, *Citizens for Fair Utility Regulation v. Nuclear Regulatory Commission,* 898 F.2d 51, 53-54 (5th Cir. 1990) (hereinafter *CFUR v. NRC*), and set forth in Appendix A to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, pp. A-2 to A-7.

SUMMARY OF ARGUMENT

The procedural issue presented by the Petition for Writ of Certiorari is a commonplace one and one which has been well-settled for over twenty years. The Commission, like other federal administrative agencies, has promulgated regulations governing untimely petitions to intervene in contested proceedings. 10 C.F.R. § 2.714 (1990). Pursuant to those regulations, as well as long-established Commission and federal court precedent, the Commission denied CFUR's petition to intervene and request for renewed hearings on the operating license for Comanche Peak, which was filed nine years out-of-time, six years after CFUR voluntarily withdrew from those hearings, and one month after those hearings had been duly dismissed by the Atomic Safety and Licensing Board (ASLB).

The United States Court of Appeals for the Fifth Circuit affirmed the Commission's decision and held that the Commission had not abused its discretion when it denied CFUR's extraordinarily untimely petition to intervene. In particular, the Fifth Circuit upheld the Commission's finding that CFUR had failed to meet its affirmative burden to show "good cause" for its untimely petition to intervene. *CFUR v. NRC,* 898 F.2d at 54-55. Furthermore, the Fifth Circuit affirmed the Commission's finding that CFUR had failed to make a compelling showing on the most important of the remaining factors that control a decision to grant or deny an

untimely petition to intervene, namely: (1) CFUR had failed to demonstrate an ability to contribute to the record; and (2) in light of CFUR's six year absence from the operating license hearings and the fact that those hearings had been dismissed, CFUR had failed to show that its admission would not delay those proceedings or broaden the issues. *Id.* at 55. CFUR does not contest these latter findings.

In its Petition for Writ of Certiorari, CFUR makes little attempt to address the factual or legal basis of either the Commission's or the Fifth Circuit's decision and, equally important, fails to articulate any sound basis for this Court to grant plenary review of the decision below. Instead, CFUR improperly attempts to raise issues never argued below[3] and reiterates, in a somewhat different form, the same arguments previously advanced and found to be meritless by both the Commission and the Fifth Circuit. Those arguments should similarly be rejected by this Court.

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[3] In its questions presented, CFUR suggests that the fifth amendment to the United States Constitution and the Atomic Energy Act of 1954 are somehow implicated by the Commission's denial of CFUR's intervention. Not surprisingly, CFUR never explains in its argument how either the due process clause or the provisions of the Atomic Energy Act were in any way violated by a decision to deny a petition to intervene filed years after the required filing date. Although CFUR mentioned the due process clause in its petition for review before the Fifth Circuit, it chose not to brief or argue this issue before the Fifth Circuit and never presented these arguments to the Commission. *See* Petition for Review at 4, *CFUR v. NRC*, 898 F.2d 51 (No. 89-4124 filed Feb. 15, 1989). Because these arguments were not presented to either the Commission or the Fifth Circuit, they may not be presented for the first time before this Court. *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952).

In a similar vein, although CFUR briefly mentioned problems with check valves before the Commission and the Fifth Circuit, CFUR never argued that the now-corrected problems with certain check valves constituted a "fundamental flaw." Hence, this legal argument is also improperly raised in the Petition for Writ of Certiorari. Nonetheless, we briefly address this argument later in this Brief in Opposition.

REASONS FOR DENYING THE WRIT

I. The Fifth Circuit And The Commission Correctly Decided That CFUR Failed To Establish "Good Cause" For Its Untimely Petition To Intervene.

The requirement to show good cause for an untimely intervention petition under section 2.714(a)(1) of the Commission's regulations is a reflection of a fundamental public interest associated with the Commission's licensing process.[4] The public's substantial interest in the timely and orderly conduct of Commission proceedings, "'fairness to all parties . . . and the obligation of administrative agencies to conduct their functions with efficiency and economy, require that Commission adjudications be conducted without unnecessary delays.'" *Nuclear Fuel Services, Inc.* (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975) (quoting 10 C.F.R. Part 2, Appendix A). The Commission's well-settled case law holds that late petitioners have a substantial burden to justify their tardiness. *Id.* Significantly, CFUR

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[4] In order to intervene in a proceeding after the period for intervention allowed by the Federal Register notice, an untimely petitioner has the burden to demonstrate that the balance of the following factors favor admission:

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

10 C.F.R. § 2.714(a)(1) (1990). Where an untimely petitioner, such as CFUR, has failed to demonstrate good cause, then it must make a compelling showing on the remaining factors. CLI-88-12, 28 NRC at 610; *CFUR v. NRC*, 898 F.2d at 54.

takes no issue with this principle, but merely with the Commission's failure to credit its excuse for its extraordinarily late filing.

CFUR filed its petition to intervene nine years after the deadline for filing, six years after voluntarily withdrawing from the Comanche Peak operating license hearings, and one month after the presiding ASLB issued an order dismissing those hearings. "[P]etitioners for intervention who inexcusably miss the filing deadline by not merely months, but by several years, have an enormously heavy burden to meet." *Puget Sound Power & Light Co., et al.* (Skagit Nuclear Power Project, Units 1 and 2), ALAB-559, 10 NRC 162, 172 (1979), *vacated on other grounds*, CLI-80-34, 12 NRC 407 (1980).

CFUR attempts to justify its failure to file a timely intervention by arguing that the termination of the hearing process, which resulted from a settlement between CASE[5] and TU Electric, somehow constitutes good cause for its untimely petition.[6] This very argument was previously made to both the Commission and the Fifth Circuit and flatly rejected.

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[5] Citizens Association for Sound Energy (CASE) was the only existing intervenor in the operating license hearings at that time.

[6] CFUR's description of the CASE-TU Electric Settlement so markedly misrepresents the Settlement's effect on the NRC's review of safety issues that a brief reply is in order. First, the Settlement did not limit the review of any relevant safety issues. The termination of an NRC licensing proceeding, without a substantive resolution by the ASLB of a previously contested issue, leaves the NRC Staff with the responsibility for resolving those safety or environmental issues that are relevant to the findings that must be made before a license can be issued. The CASE-TU Electric Settlement had no impact on the NRC Staff review. Second, the Settlement does not preclude CASE from bringing *any* safety concerns it might have to the attention of the NRC or administratively protesting any actions proposed by the NRC or TU Electric pursuant to the procedures set forth in 10 C.F.R. § 2.206 (1990). Indeed, under the terms of the Settlement, CASE is provided substantial funding and access to the plant in order to enable CASE to monitor ongoing activities and raise such issues with the NRC.

In its decision, the Commission held that a potential intervenor may not demonstrate "good cause" for untimely intervention by relying on an existing party to represent its views or positions and then attempting to substitute itself after the existing party has withdrawn. CLI-88-12, 28 NRC at 609. The Commission followed the Atomic Safety and Licensing Appeal Board decision in *Gulf States,* which held that reliance by a potential intervenor on an existing party, who subsequently withdrew from the proceedings, to represent the potential intervenor's interests does not constitute "good cause" under 10 C.F.R. § 2.714(a)(1). *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 796-97 (1977); *see also Puget Sound,* 10 NRC at 172-73; *Consolidated Edison Co. of New York* (Indian Point, Unit No. 2), LBP-82-1, 15 NRC 37, 39-40 (1982). A late petitioner assumes the risk that the existing litigants will not satisfy its expectations, and the withdrawal of the litigants was "a foreseeable consequence of the materialization of that risk . . . ." *Gulf States*, 6 NRC at 797 (quoting *Duke Power Co.* (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-440, 6 NRC 642, 645 (1977)).

The Commission's decision also pointed to a landmark decision of the United States Court of Appeals for the District of Columbia Circuit affirming a Commission order denying an untimely intervention petition. CLI-88-12, 28 NRC at 609-10. In that case, the court held:

> [A] person should not be entitled to sit back and wait until all interested persons who do so act have been heard, and then complain that he has not been properly treated. To permit such a person to stand aside and speculate on the outcome * * * and then permit the whole matter to be reopened in his behalf, would create an impossible situation.

Easton Utilities Commission v. Atomic Energy Commission, 424 F.2d 847, 851 (D.C. Cir. 1970) (quoting *Red River Broadcasting Co. v. Federal Communications Commission*, 98 F.2d

282, 286-87 (D.C. Cir.), *cert. denied*, 305 U.S. 625 (1938)). The court further stated:

> We do not find in statute or case law any ground for accepting the premise that proceedings before administrative agencies are to be constituted as endurance contests modeled after relay races in which the baton of proceeding is passed on successively from one legally exhausted contestant to a newly arriving legal stranger.

Id. at 852.

In its decision affirming the Commission's denial of CFUR's untimely intervention, the Fifth Circuit noted that an administrative agency has broad discretion in applying its own regulations[7] and specifically rejected "CFUR's allegation

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[7] In reviewing agency action, a court must defer to the agency's judgment unless the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1988); *see, e.g., Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983). This Court should afford the Commission the widest latitude where the action under review involves the agency's application and interpretation of its own regulations. *Groups United Against Radiation Danger v. NRC*, 753 F.2d 1144, 1148 (D.C. Cir. 1985); *see also Baltimore Gas*, 462 U.S. at 103; *CFUR v. NRC*, 898 F.2d at 54 (citing *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835 (1989)).

Similarly, when examining a determination that is within an agency's area of special expertise, a reviewing court must be at its "most deferential." *Baltimore Gas*, 462 U.S. at 103; *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984). In this case, a massive record had been developed over nine years of litigation and TU Electric had completed construction and design quality verification programs of unprecedented scope and depth. The Commission was uniquely situated to exercise its expertise in evaluating CFUR's purported issues, how they related to the existing Comanche Peak record and programs, if at all, and the nature of CFUR's expertise, if any, to make a contribution to a sound record. Great deference should be afforded to the Commission's expertise and, in the absence of any showing that the Commission abused its discretion, this Court should deny the Petition for Writ of Certiorari.

of surprise at CASE's settlement, [because] such action on the part of CASE, in and of itself, does not create good cause for CFUR's late-filed petition to intervene." *CFUR v. NRC*, 898 F.2d at 55. "NRC precedent consistently and clearly indicates that a potential intervenor cannot rely on another intervenor to present a certain view or represent certain interests without assuming the risk that the intervenor will not do so." *Id.* (citing *Gulf States*, 6 NRC at 760, and *Easton Utilities*, 424 F.2d at 847).

In an attempt to avoid the Fifth Circuit's ruling and the D.C. Circuit's holding in *Easton Utilities*, CFUR points to an earlier decision of the D.C. Circuit, *WFTL Broadcasting Co. v. Federal Communications Commission*, 376 F.2d 782 (D.C. Cir. 1967), apparently for the proposition that the withdrawal of CASE could, in certain circumstances, constitute good cause for an untimely intervention request. Petition for Writ of Certiorari at 11-12. CFUR relies on *WFTL* to support the claim that its untimely intervention should have been granted in order to permit it to represent the public interest. *Id.*

In *WFTL*, four competing applications for a radio station were filed with the Federal Communications Commission (FCC). Prior to any hearings, three applications were withdrawn and the matters at issue changed significantly. WFTL thereafter sought to intervene as a matter of right. The FCC denied the request. *WFTL*, 376 F.2d at 783. On review, the D.C. Circuit remanded the case to the FCC on the ground that the court was "not able to discern whether the Commission ha[d] in fact addressed itself to allowing intervention as an exercise of its discretion . . . " as provided in the FCC regulations upon a showing of good cause. *Id.* at 784. The court therefore directed the FCC to consider whether permissive or discretionary intervention should be allowed under the FCC's regulations. *Id.* at 785. The court never stated the very different proposition apparently advanced by CFUR,

that the withdrawal of parties from an administrative proceeding constitutes good cause. Indeed, precisely that argument was squarely addressed and rejected by the D.C. Circuit in its later decision in *Easton Utilities*, 424 F.2d at 851-52.

In contrast to the intervening party in *WFTL*, CFUR has been given every possible opportunity to demonstrate good cause for its untimely request for intervention and has failed to do so in every instance. Moreover, as to its purported desire to represent the public interest, the Commission and the Fifth Circuit found not only that CFUR had failed to establish good cause, but that CFUR had also failed to demonstrate any ability to contribute anything of value to the development of a sound record. CLI-88-12, 28 NRC at 610-11; *CFUR v. NRC*, 898 F.2d at 55. Thus, CFUR, although given the opportunity to do so, failed to show that it had any ability to represent its own or any other interest in the proceeding. Significantly, CFUR does not challenge either the Commission's decision on that issue or the Fifth Circuit's affirmance of that decision.

CFUR also relies on the Commission's decision in *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-83-25, 18 NRC 327 (1983), for the proposition that the withdrawal of an intervenor in an NRC licensing proceeding constitutes a "recent event" and thus good cause for an untimely intervention petition. The term "recent event" as used in *Metropolitan Edison* and Commission case law does not include the withdrawal of existing parties but involves changes in regulatory standards or new facts or evidence on substantive issues, none of which were present in the instant case. *See Cincinnati Gas & Electric Co., et al.* (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 572-73, 574-75 (1980); *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982). *Metropolitan Edison* does not support the proposition that the CASE-TU Electric Settlement and the withdrawal of

CASE as a party constitute a "recent event" providing a basis for CFUR's untimely intervention.

Finally, CFUR relies on *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-903, 28 NRC 499 (1988), and *Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (D.C. Cir. 1984), *cert. denied sub nom. Arkansas Power & Light Co. v. Union of Concerned Scientists*, 469 U.S. 1132 (1985), to support its claim that certain (now corrected)[8] problems experienced by TU Electric with check valves constitute a "fundamental flaw" requiring the reopening of the record. Petition for Writ of Certiorari at 11-15. Apart from the fact that this legal issue was never raised before either the Commission or the Fifth Circuit, CFUR's argument is irrelevant to a determination of whether the denial of its intervention petition was an abuse of discretion for two reasons.

First, the case law regarding "fundamental flaws" has little or no application to problems experienced with specific pieces of equipment in a nuclear power plant. Rather, a fundamental flaw generally refers to serious programmatic or generic flaws in a program such as an emergency preparedness plan which is material to a licensing decision.[9] Indeed, the law could hardly be otherwise. Given the complexity of nuclear power plants, if any single problem with a piece of equipment could result in new hearings at the request of would-be intervenors, no nuclear power plant could escape virtually never-ending hearings.

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[8] The problems experienced with the check valves were corrected by TU Electric and inspected by the NRC. The plant is now in commercial operation.

[9] *See Long Island Lighting Co.*, 28 NRC at 505 (a fundamental flaw "reflects a failure of an essential element of the [emergency preparedness] plan, *and*, second, it can be remedied only through a significant revision of the plan."). A fundamental flaw is never found on the basis of "minor or ad hoc problems" such as discrete and isolated equipment problems. *Union of Concerned Scientists*, 735 F.2d at 1448.

Second, CFUR does not explain how its new argument regarding a "fundamental flaw" in any way affects the Commission's decision that CFUR failed to establish good cause for its untimely intervention. At best, CFUR simply argues that if a "fundamental flaw" exists then the Commission, at the behest of *an existing party*, could have reopened the record. Whatever the merits of that proposition, it most assuredly adds nothing to the question of whether the Commission abused its discretion in finding that CFUR failed to demonstrate good cause for its untimely request for intervention.

II. The Petition For Writ Of Certiorari Does Not Raise An Important Unsettled Question Of Federal Law.

CFUR's Petition for Writ of Certiorari makes no attempt to affirmatively demonstrate that it satisfies the standards for grant of certiorari embodied in this Court's Rule 10. There is no attempt to show that the Fifth Circuit's decision conflicts with any decision of this Court, another United States court of appeals, or that of a state court of last resort. Sup. Ct. R. 10.1(a), (c). Nor is there any claim that the Fifth Circuit "departed from the accepted and usual course of judicial proceedings . . . ." Sup. Ct. R. 10.1(a). At best, CFUR is perhaps implicitly arguing that the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. *See* Sup. Ct. R. 10.1(c).

CFUR's Petition revolves around well-settled and straightforward questions of federal law. CFUR is not contesting the validity of the NRC's longstanding regulation or case law governing untimely petitions. Rather, CFUR is contesting an exercise of the Commission's discretion to deny CFUR's petition to intervene and request for a hearing that was filed nine years out-of-time, six years after CFUR had already withdrawn from the Comanche Peak operating license hearings, and one month after those hearings had been duly dismissed. In reality, the issue presented by CFUR's Petition for Writ of Certiorari is whether the Commission

abused its discretion in denying CFUR's untimely intervention and regulating the orderly conduct of its licensing process.[10] This routine procedural issue, which was properly addressed by the Fifth Circuit, neither rests on nor raises any important question of federal law that is worthy of consideration by this Court.

Nor is there any possible merit to CFUR's claim that the CASE-TU Electric Settlement, which resulted in the dismissal of the Comanche Peak operating license hearings, was somehow irregular or improper. On June 28, 1988, after nine years of litigation, CASE and TU Electric reached an agreement that resolved the controversy between the parties and provided the basis for the dismissal of the then-ongoing operating license proceeding. Under the 1988 CASE-TU Electric Settlement, CASE agreed to exchange its rights to litigate residual issues on the implementation of TU Electric's quality validation program for a set of additional rights: access to the plant; the resources to retain experts to monitor issues of interest to CASE; and the ability to obtain resolution of any concerns through the NRC Staff. *Texas Utilities Electric Co., et al.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-88-18B, 28 NRC 103, 107-135 (1988) (Exhibits A and B (the Joint Stipulation and Settlement Agreement, respectively)); Tr. 25,266-70, 25,287-88. The ASLB fully considered the terms of the 1988 CASE-TU Electric Settlement and found it consistent with Commission policy before dismissing the operating license proceeding. *Texas Utilities Electric Co., et al.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-88-18A, 28 NRC 101, 102 (1988); LBP-88-18B, 28 NRC at 103; Tr. 25,287-88.

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[10] In fact, CFUR admits that the Commission "does not violate either the due process clause of the fifth amendment nor the act of congress [The Atomic Energy Act of 1954] that creates a right in citizens to be heard merely by creating and applying regulations designed to promote the orderly conduct of agency business." Petition for Writ of Certiorari at 6.

The Commission has a longstanding policy that encourages "the fair and reasonable settlement of contested initial licensing proceedings . . . ." 10 C.F.R. § 2.759 (1990). In promulgating this policy:

> The Commission [was] concerned not only with its obligation to the segment of the public participating in licensing proceedings but also with its responsibility to the general public — a responsibility to arrive at sound decisions, whether favorable or unfavorable to any particular party, in a timely fashion. The Commission expressly recognize[d] the positive necessity for expediting the decisionmaking process and avoiding undue delays.

37 Fed. Reg. 15,127 (July 28, 1972). Permitting CFUR to intervene nine years late would effectively eviscerate this policy and would make settlements of NRC proceedings virtually impossible.

In summary, the Commission's denial of CFUR's extraordinarily untimely petition and the Fifth Circuit's affirmance of that denial were based on the specific facts of this case and were grounded on sound public policy and well-settled case law. Accordingly, this case presents no unsettled issues of federal law that are worthy of review by this Court.

CONCLUSION

CFUR's Petition presents no special or important reason for issuing the writ. The case involves a narrow, fact-specific and routine procedural issue which was correctly decided below in accordance with long-established and well-founded precedent. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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August 13, 1990

APPENDIX A

CLI-89-6

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Lando W. Zech, Jr., Chairman
Thomas M. Roberts
Kenneth M. Carr
Kenneth C. Rogers
James R. Curtiss

In the Matter of **Docket Nos. 50-445-OL**
50-446-OL
50-445-CPA

TEXAS UTILITIES ELECTRIC COMPANY, *et al.*
(Comanche Peak Steam Electric Station, Units 1 and 2)

April 20, 1989

MEMORANDUM AND ORDER

I. INTRODUCTION

This case is before the Commission on two motions by Mr. Joseph Macktal, an individual petitioner. Mr. Macktal asks the Commission for (1) "limited intervention" in the Comanche Peak proceedings and (2) reconsideration of its recent order denying a petition by the Citizens for Fair Utility Regulation ("CFUR") to intervene late in the Comanche Peak proceedings. *See* CLI-88-12, 28 NRC 605 (1988). The

applicant, Texas Utilities Electric Company ("TUEC") and the NRC Staff have responded in opposition to both motions. After due consideration, we have decided to deny both motions for the reasons that follow.

II. BACKGROUND

In order to understand how Mr. Macktal's motions fit into the tortured history of the Comanche Peak proceedings, a brief review of history — both ancient and recent — will be necessary. The Commission published receipt of TUEC's application for an operating license in the *Federal Register* on May 12, 1978. *See* 43 Fed. Reg. 20,583. Following publication of the Notice of Opportunity for Hearing, 44 Fed. Reg. 6995 (Feb. 5, 1979), three organizations filed timely petitions to intervene and requests for hearing: Citizens Association for Sound Energy ("CASE"), Citizens for Fair Utility Regulation ("CFUR"), and Texas Association of Community Organizations for Reform Now/West Texas Legal Services ("ACORN"). The State of Texas filed a timely petition to participate as an interested state, pursuant to 10 C.F.R. §2.715(c). Therefore, the Commission established a Licensing Board, 44 Fed. Reg. 15,813 (Mar. 15, 1979), which subsequently admitted CASE, CFUR, and ACORN as Intervenors and Texas as an interested state. Order Relative to Standing of Petitioners to Intervene (June 27, 1979). On June 16, 1980, the Board issued an order admitting twenty-five contentions and three Board questions for litigation.

On July 21, 1981, the Board accepted ACORN's voluntary motion for dismissal from the proceeding. Likewise, on March 5, 1982, the Board accepted CFUR's voluntary withdrawal from the proceeding. The proceeding then continued unabated with CASE as the sole intervenor. By 1984, the proceeding had resolved all contentions except Contention 5, relating to Quality Control/Quality Assurance ("QA/QC"). In 1986, a second proceeding commenced relating to TUEC's

request for an amendment to its Construction Permit for Unit 1 seeking additional time to complete construction.

On July 1, 1988, CASE and TUEC reached a settlement agreement resolving all matters at issue between them. Essentially, CASE agreed to withdraw from the proceedings and TUEC agreed to reimburse CASE for certain expenses incurred during the litigation, to install a CASE representative in an oversight position at Comanche Peak, and to provide that representative with expenses and technical assistance. CASE and TUEC submitted a joint motion to dismiss the proceedings as settled and the Licensing Board granted the motion on July 13, 1988.

Shortly thereafter, on August 11, 1988, CFUR filed a petition before the Licensing Board to "re-intervene" in the proceedings. CFUR also filed two "Supplements" to its initial petition. The NRC Staff and TUEC responded to the initial petition and the "First Supplement." Initially, there was some confusion over which Commission tribunal had jurisdiction over CFUR's petition. In order to avoid any confusion and to spare the parties needless expense and delay, the Commission itself took jurisdiction of the matter.

On December 16, 1988, while the CFUR petition was still pending, Mr. Macktal filed a motion before the Licensing Board, seeking "leave to proceed as an intervenor limited to questions of the scope, impact and interpretation" of this settlement agreement. Mr. Macktal's motion states that he reviewed the Staff's response in early November and TUEC's response in early December (Motion for Limited Intervention at 1), and that he filed this attempt to intervene in order to rebut the interpretations assigned the disputed agreement

by the Staff and TUEC.[1] The NRC Staff has responded in opposition, arguing that Mr. Macktal does not meet the criteria for a late-filed petition for intervention. *See* 10 C.F.R. §2.714(a)(1)(i)-(v). TUEC did not respond.

On December 21, 1988, the Commission issued CLI-88-12, denying the CFUR petition to intervene, based upon an application of the five-factor test contained in §2.714(a)(1)(i)-(v). *See* CLI-88-12, *supra*. However, the Commission did not rule on Mr. Mactal's motion for limited intervention because the NRC Staff and TUEC had not yet had a chance to respond to it. Mr. Macktal then filed the second motion before us today seeking reconsideration of CLI-88-12, alleging that he was "prejudiced" by that decision.

Specifically, Mr. Macktal requests that the Commission vacate Part IV of CLI-88-12 (in which we discussed the disputed settlement agreement) or, in the alternative, stay the entire order and grant him the relief requested in his earlier motion, i.e., limited intervention status for the purpose of explaining his views on the disputed settlement agreement. Mr. Macktal alleges that the Commission misconstrued or misinterpreted the settlement agreement in reaching its decision in CLI-88-12 and that the decision contains a number of "serious errors of law." Mr. Macktal does not allege any errors in the Commission's determination that CFUR's petition does not meet the five-factor test found in §2.714(a)(1)(i)-(v).

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[1] We infer from Mr. Macktal's motion that he believes that he was prejudiced because neither he nor his counsel was served with the responses by Staff or TUEC to CFUR's petition to intervene or to the "First Supplement." We find no indication in the record that either he or his counsel had filed a notice of appearance or had sought to be served by any party to the proceeding. Our last communication from Mr. Macktal's counsel indicated that they were withdrawing from any participation in the case. *See* Notice of Withdrawal (July 15, 1988). Therefore, we know of no obligation for counsel for the NRC Staff, TUEC, or even CFUR to serve Mr. Macktal with copies of their pleadings.

In response, the NRC Staff argues that Mr. Macktal does not have standing to seek reconsideration because he had not been admitted as a party to the proceeding at the time CLI-88-12 was issued. In its response, TUEC argues that Mr. Macktal has not attempted to demonstrate that his motion meets the Commission's criteria for granting a stay of a final order.[2]

III. THE MOTION FOR "LIMITED INTERVENTION"

The first matter before us is Mr. Macktal's motion for limited intervention.[3] In the motion, Mr. Macktal "requests leave to proceed as an intervenor limited to questions of the scope, impact and interpretation of the January 2, 1987 illegal settlement agreement." Motion for Limited Intervention at 2. Mr. Macktal claims that he "may be prejudiced in his 'reopened' Department of Labor proceeding as well as other

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[2] Mr. Macktal has also filed a pleading which he has styled as a "Reply" to the responses filed by Texas Utilities and the NRC Staff. NRC regulations specifically reject such pleadings. "The moving party shall have no right to reply [to an answer in response to a motion], except as permitted by the presiding officer or the Secretary or the Assistant Secretary." 10 C.F.R. §2.730(c). Nevertheless, in this situation, the Commission has reviewed this pleading in an effort to afford Mr. Macktal every opportunity to present his case. Texas Utilities has responded with an additional pleading of its own.

[3] Mr. Macktal styled his motion as being "[b]efore the Nuclear Regulatory Commission Atomic Safety and Licensing Board." The Staff likewise styled its opposition to the motion for limited intervention as "[b]efore the Atomic Safety and Licensing Board." (TUEC did not file an opposition.) Over a month after the last pleading directed to the matter, the presiding officer of the Licensing Board panel which had been hearing the original Comanche Peak proceedings notified the Office of the Secretary that it was his belief that no panel of the Licensing Board existed which could review the motion and that, therefore, the Licensing Board did not intend to take any action on the motion whatsoever. Therefore, the Commission has taken jurisdiction to rule on this question.

litigation which may occur regarding the correct interpretation of the January 2 1987 'Settlement Agreement[,]' " and that "no party now before this tribunal shares [his] interest regarding the Settlement Agreement." *Id.*

The motion explicitly states that it seeks only "limited intervention" for a specific purpose, i.e., to brief the Commission on Mr. Macktal's views on the disputed settlement agreement. But the motion makes no attempt to demonstrate compliance with the required criteria for filing an untimely petition to intervene in an ongoing proceeding found in §2.714(a)(1)(i)-(v). For example, the motion does not discuss the standing and interest criteria, much less show that they are satisfied. Likewise, the motion includes no discussion of the five factors that a late-filed petition for intervention must address.[4] Therefore, we cannot grant the motion for limited intervention to gain party status under §2.714(a)(1)(i)-(v). However, we have considered Mr. Macktal's submission in our review of the disputed settlement agreement. *See* 10 C.F.R. §2.715(d).

IV. THE MOTION FOR RECONSIDERATION AND STAY OF CLI-88-12

Initially, we find that Mr. Macktal does not have standing to seek a stay or reconsideration of the Commission's

[4] We contrast this approach with that of CFUR which, while not persuading us that they satisfied the five factors, still attempted to address them — at least in the context of the operating license ("OL") proceeding. *See* 28 NRC at 608-12 & n.7.

decision in CLI-88-12 because he was not *a party* to the proceeding when the decision was issued.[5] Commission regulations specifically provide that "[a] petition for reconsideration may be filed by *a party* within ten (10) days after the date of decision." 10 C.F.R. §2.771(a) (emphasis added). Similarly, "[w]ithin ten (10) days after service of a decision or action *any party* to the proceeding may file an application for a stay of the effectiveness of the decision or action . . . ." 10 C.F.R. §2.788(a) (emphasis added).

Furthermore, Mr. Macktal does not have the requisite interest to seek reconsideration of this decision, i.e., he has not demonstrated an interest that might be affected by the proceeding. In fact, in his pleadings he argues that only the Secretary of Labor has jurisdiction to interpret the scope and meaning of his settlement agreement with Brown & Root. Accordingly, we find no basis for Mr. Macktal to argue that the NRC's comments on the settlement agreement in CLI-88-12 could have caused him legal harm. Nothing in CLI-88-12 hinders Mr. Macktal from presenting his objections to the settlement agreement to the Secretary of Labor or prevents the Department of Labor from invalidating that agreement if it so chooses. Furthermore, we do not believe that our statements in CLI-88-12 preclude his litigation of the agreement before the DOL under the principles of res judicata or collateral estoppel because neither Mr. Macktal nor Brown & Root were parties to CLI-88-12.

Moreover, Mr. Macktal has not even attempted to demonstrate that he meets the Commission's stay criteria. Under Commission regulations and longstanding Commission precedent, a party seeking a stay must show that it meets

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[5] In his "reply," Mr. Macktal argues that the filing of his motion for limited intervention made him a party to the proceeding, citing *Seacoast Anti-Pollution League of New Hampshire v. NRC*, 690 F.2d 1025, 1028 (D.C. Cir. 1982). We have reviewed this case and it does not stand for the proposition for which it is cited. In fact, the issue of standing is never discussed in that case, either as a part of the merits of the case or in dicta.

a balancing of the traditional four factors that would cause a court to grant a preliminary injunction including (1) the moving party's likelihood of success on the merits, (2) irreparable harm to the moving party absent a stay, (3) harm to any other party in the event of a stay, and (4) the public interest. 10 C.F.R. §2.788(e)(1)-(4). *See, e.g., Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 803 n.3 (1984); *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-81, 5 AEC 348 (1972). *See generally Virginia Petroleum Jobbers Ass'n v. FPC,* 259 F.2d 921, 925 (D.C. Cir. 1958).

V. CONCLUSION

We have determined that Mr. Macktal is not entitled to intervene as a party and does not have standing to seek reconsideration of the Commission's findings in CLI-88-12. Nevertheless, we take note of Mr. Macktal's concerns regarding his perception that our statements in CLI-88-12 constituted a possible endorsement of the settlement agreement. We emphasize that in CLI-88-12, we examined the agreement solely to determine if it prohibited Mr. Macktal from bringing his concerns to the NRC Staff and found that it did not. Our decision in CLI-88-12 was not intended as a Commission "stamp of approval" on the disputed agreement. We did state that "we do not see a violation of federal law or NRC regulation." CLI-88-12, 28 NRC at 613. But our decision denying CFUR's petition should not have depended on anything in the agreement at all. Assuming *arguendo* that the agreement violated some law or regulation, neither Mr. Macktal nor CFUR has demonstrated that the disputed agreement constitutes "good cause" for CFUR's late intervention in the operating license and construction permit amendment

proceedings under 10 C.F.R. §2.714.[6] The essential basis for denying CFUR's late intervention — that a party may not rely upon another party to represent its position and interest without assuming the risk that it will not do so — is independent of the validity of the agreement.

We are also aware that Mr. Macktal has challenged the settlement agreement before the DOL, which is at this point the appropriate forum for such action. *See* Memorandum of Understanding, 47 Fed. Reg. 54,585 (Dec. 3, 1982). Therefore, we withdraw any comment on the agreement's acceptability or legality we made in CLI-88-12 and we decline at this point to comment further on the disputed settlement agreement because it is the subject of a pending DOL case.

Finally, we note that Mr. Macktal admits that he withheld information from the NRC Staff during discussions in 1986. *See* Second Macktal Affidavit at 1. That withholding of information is regrettable. We request Mr. Macktal to promptly bring any concerns he has to the NRC Staff for their

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[6] The most that can be said for the agreement regarding the test for late intervention is that Mr. Macktal's presence might support CFUR's ability to contribute to the development of a sound record. 10 C.F.R. §2.714(a)(1)(iii). However, such support is not sufficient to overcome CFUR's lack of "good cause" under the required balancing of these five factors.

resolution.[7] The Staff will review Mr. Macktal's technical concerns about Comanche Peak. Such review is a normal Staff practice.

[7] Mr. Macktal signed a confidentiality agreement with the NRC Staff which protected the nature of his concerns but not the fact that he brought concerns to the NRC or his identity. *See* NRC Staff Response to CFUR's First Supplement at 5. Under that agreement, he provided allegations to the NRC Staff which were addressed in regular inspection reports at the Comanche Peak facility. *Id.* The Staff has attempted to provide Mr. Macktal with copies of those reports and Mr. Macktal has never explained or expressed any disagreement with resolution of any specific allegation. *Id.* If Mr. Macktal is dissatisfied with the resolution of those items or if he has other items of concern, including any that he may have deliberately withheld from the NRC Staff during interviews in 1986 (*see* Second Macktal Affidavit at 1), he should bring those matters to the attention of the Comanche Peak Division of the Office of Nuclear Reactor Regulation ("NRR") — formerly the Office of Special Projects — or address them directly to the Director of NRR under 10 C.F.R. §2.206. While we have in essence "vacated" Part IV of CLI-88-12, we still adhere to our statement in that order that the disputed agreement does not prevent Mr. Macktal from bringing any of his safety concerns directly to the NRC Staff.

It is so ORDERED.[8]

For the Commission[9]

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of April 1989.

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[8] Mr. Macktal's motion for oral argument on the motion for reconsideration is denied. Mr. Macktal has also filed a "Motion to Be Served with Notice of Commission Proceedings," apparently seeking specific notice of the date of issuance of this order. Normally, the Commission publishes weekly in the *Federal Register* a notice of all Commission meetings for the next 4 weeks, including affirmation sessions and the matters to be affirmed. When matters before the Commission are expedited, the Commission attempts to provide at least one week's notice of the subject of affirmation sessions to all interested parties. In this case, the Commission has attempted to expedite the issuance of this order. Accordingly, the Office of the General Counsel has notified Mr. Macktal's counsel of the date and time of this session. Therefore, we have in essence served Mr. Macktal with the requested notice of the proceedings in this matter.

[9] Commissioner Carr was not present for the affirmation of this order; if he had been present he would have approved it. Commissioner Curtiss was unavailable to participate in this decision.